UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION SEVEN

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J.G. Kern Enterprises, Inc.,

Respondent,

and

Case No.: 07-CA-231802
07-CA-245744
07-CA-252759

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL UNION 228,

Charging Party.

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POST-HEARING BRIEF OF CHARGING PARTY

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INTRODUCTION

It is a tenet of labor law that, after a union is certified as the bargaining representative, the parties be given sufficient time, free from unfair labor practices, before an employer may withdraw recognition and refuse to bargain. This case is an example of an employer's attempt to flout that fundamental principle.

On October 3, 2018, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("Union") was certified as the collective bargaining representative of a unit of employees at J.G. Kern Enterprises ("Company"). Right away, the Union reached out to begin bargaining. The Company responded, through a representative, and proceeded to schedule, then cancel several bargaining sessions over the next few months. Because of the Company's delay, the parties did not meet to commence bargaining until January 10, 2019, more than three months after certification.

Once bargaining commenced, the Company refused to provide the Union with requested information which was relevant and necessary to bargain, namely benefit (including healthcare) costing information. The Company's refusal was confirmed, in writing, in April 2019 and again in July 2019, frustrating the bargaining process.

On November 25, 2019, the employer, claiming to have received evidence that a majority of its employees no longer supported the Union, withdrew recognition and refused to bargain further. This withdrawal was less than one year after the parties had commenced bargaining. This withdrawal was also done before the parties had an opportunity to bargain for a reasonable time, free from unfair labor practice.

For these reasons, as more fully explained below, the Company has violated the Act by its initial refusal to bargain, its refusal to provide information, and its withdrawal of recognition. Therefore, the Charging Party requests that the relief sought in the Complaint be granted.

FACTS

After certification, the Company schedules, then cancels, bargaining dates several times, resulting in a three-month delay in the commencement of bargaining.

On October 3, 2018, the Union was certified as the collective bargaining representative, pursuant to an NLRB election. GC ex. 2; Tr. 13:17-14:20 (Torrente). Paul Torrente ("Torrente"), then president of UAW Local 228, took the lead in attempting to schedule negotiations, and reached out to the Company on October 8, 2018. Tr. 15:15-20 (Torrente). While he did not receive a direct response from the Company, he soon received a response from the Company's attorney, Jonathan Sutton ("Sutton"). Tr. 16:2-5 (Torrente). The Union's International Servicing Representative, Diane Virelli ("Virelli") also reached out to Sutton multiple time in October 2019 via certified mail. Tr. 43:14-21 (Virelli). Those letters were returned to her undelivered. Tr. 43:14-21 (Virelli).

Torrente and Sutton then had multiple conversations, over email and phone calls, regarding scheduling bargaining sessions and other concerns within the facility. Tr. 16:10-19 (Torrente). On October 17, 2018, via email, Sutton offered November 5-7 or November 26-28 as proposed dates for initial bargaining sessions. GC ex. 3. The next day Torrente responded that the Union was ready and willing to meet during both of those proposed times. Id.

Having not heard anything from Sutton after accepting those bargaining dates, Torrente reached out to confirm on November 2, 2018. Id. Virelli, having her letters to Sutton returned, also reached out to Sutton via e-mail on the 2nd, made an information request, and again,

requested bargaining. GC ex. 12.[1] Sutton did not reply until November 5, the day the parties were scheduled to meet, and cancelled the bargaining meeting because he was "stuck on Guam." GC ex. 4. Sutton added that he was also not going to be able to meet later in the month because he, "just sold my house in Houston, and have to pack a 6,700 ft house in very short order." Id. At the end of the e-mail, Sutton offered to "ask someone else to step in and fill my spot, in an effort to get things started." Id. The same day, Torrente responded stating, " we need to get the ball rolling," "we cannot wait any longer," and accepted Suttons offer to provide a substitute: "I look forward to hearing from someone, whoever that may be."[2] Id.

Shortly thereafter, Torrente was contacted by James Teague ("Teague") who indicated that he was replacing Sutton as the representative for the Company for a short period of time. Tr. 21:2-14 (Torrente). They communicated over telephone and text and agreed to meet on the previously agreed to dates of November 26-27. Tr. 21:18-22 (Torrente).[3] On the day the parties agreed to meet, Teague cancelled via text message. Tr. 21:21-25 (Torrente). They rescheduled for November 30, but Teague later cancelled that meeting as well. Tr. 22:2-7 (Torrente).[4]

[1] Virelli also followed this email with another certified letter which was also returned. Tr. 45:23-46:5 (Virelli).

[2] Sutton's testimony is that Torrente did not take him up on this offer to provide a substitute. Tr. 66: 13-18 (Sutton). However, this claim is clearly contradicted by GC ex. 16 which was introduced as a rebuttal exhibit, and that fact that James Teague reached out to Torrente soon after the exchange.

[3] Around this time, Virelli, having not heard from Sutton, sent another certified letter, this time directly to the Company, requesting information and demanding bargaining. It was received by the Company. GC ex. 13.

[4] Teague denies speaking with Torrente regarding scheduling dates for bargaining, but admits to having "some communication" with Torrente during this time. Tr. 103:1-6 (Teague).

On December 12, 2018, Sutton reappeared to state that he was busy moving into his new house and would not be able to meet until after December 17. Tr. 22:20-24 (Torrente). The parties thereafter agreed to meet on January 10 and 11, 2019. GC ex. 5.

When bargaining began, the Company refused to provide necessary information.

When the parties met for negotiations on January 10, 2019, the Union's need for information from the employer became apparent immediately. This was because the employer demanded a complete agreement from the Union and did not want to put an agreement together piecemeal. Tr. 24:3-8 (Torrente), 57:19-58:2 (Virelli), 67:1-13 (Sutton). So the Company was essentially demanding a benefits proposal on day one of bargaining.[5]

As bargaining progressed, the need for certain information, specifically benefits costing information, became more and more necessary. As Torrente testified, "In order to cost the agreement, to figure out, you know, our proposals and put a whole contract together, it's important for us to know what we have to work with. Therefore, it was very important for us to know the cost of the benefit package and what the benefit package entailed." Tr. 23:23-24:2 (Torrente). As Virelli testified, the Union needed the information "So we could make reasonable proposals to present to the Company." Tr. 49:7-9 (Virelli).

[5] It is worth noting that, while Sutton testified that he wanted a full contract proposal at the first and second meeting in January and February, he did not communicate this demand to the Union prior to the January session. Tr. 77:17-19 (Sutton). He otherwise admitted that the parties did bargain during those two sessions and that the union came with proposals to each. Tr. 77:10-16, 78:11-14 (Sutton), 106:17-23 (Torrente). The Company also admitted to providing no proposals to the Union during those two sessions. Tr. 89:19-90:1 (Allen).

In April 2019, Virelli sent a written, comprehensive benefits request to Sutton. Tr. 24:9-17 (Torrente).[6] When Sutton was subsequently replaced as the Company negotiation by Christopher McHale ("McHale"), Torrente resubmitted the request in July in 2019. Tr. 24:18-25:1 (Torrente). The Union did not receive a complete response to either.[7]

Sutton responded to the Union's information request by largely denying it. He provided some information, but also wrote throughout his response, "Cost information will not be shared." GC ex. 10. The same day, Torrente responded by emailing Sutton, stating that the Company's response was "not sufficient" and restating the need for the benefits costing information. GC ex. 6. Sutton responded again stating, "I have reviewed the requested information, but will not be providing same. I have stated previously there is a limit to the information we will be providing, and in this you ask for more than we will share. In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan." Id.[8] Sutton's testimony confirmed the same: "They wanted to know our specific cost structure and exactly what we were paying for benefits, and we weren't going to provide that." Tr. 74:23-25.

[6] Her previous, unanswered requests also contained requests for benefit information. Tr. 48:16-20 (Virelli).

[7] Although the record is not entirely clear, it appears that there was an agreement between the parties, around this time, to meet for only two days per month, at eight hours each day. Tr. 82: 4-6 (Allen).

[8] Disappointingly, Sutton's testimony compares collective bargaining to "going to a car dealership." Tr. 75:1-6 (Sutton). Such a simile, that collective bargaining is like commission based retail sales, is not only inapt, but reveals the Company bad faith attitude towards the whole process, especially as it applies to the duty to provide information that is necessary and relevant to bargaining.

When the same request was resubmitted to McHale, the Union received the same response. There was some initial back and forth about what was already provided. GC exs. 7-9. However, on July 25, 2019, McHale ultimately resent Sutton's earlier response, and stated, "It is the company's position that all of the information that the union is entitled to has been disclosed." GC ex. 10.[9]

Despite the Company's attitude toward bargaining, much progress towards a contract was made. The parties had tentatively agreed to 35 items. Tr. 35:5-7 (Torrente). The only items that were left remaining until a full "TA" could be reached were wages, profit sharing, signing bonuses, and, of course, insurance benefits. Tr. 34:24-35:4 (Torrente). As Virelli put it, "We were, I would say, 99 percent done with that contract and hoped to wrap it up within the two scheduled days that we had. So, we were pretty much done. We had done everything else but the economics, pretty much." Tr. 54:6-11 (Virelli).

The Company withdrew recognition and refused to bargain despite the previous unremedied ULPs.

The parties had a bargaining session scheduled for November 25, 2019. Instead of bargaining on that day, McHale hand delivered a letter to the Union's negotiation team stating that they had received a petition signed by a majority of employees stating that they do not wish

[9] The Company provided *some* information to the Union. It provided a 2018 benefits SPD (R ex. 1), which is a summary of benefits but does not provide employer costing information. In 2019, the Union requested an updated SPD for the new benefit year, but the Company only responded that benefits had not changed. The Company refused to provide any documentation to that effect. Tr. 31:7-22 (Torrente). The Company also provided a Health Insurance Option Form (R ex. 2) and a list of selections by employees (R ex. 3), but, again, those documents had some information regarding *employee* cost, but not *employer* cost. The Union made it clear throughout that it needed that employer costing information. Tr. 30:17-31:4, 39:19-22 (Torrente) 59-:4-12 (Virelli).

to be represented by the UAW. GC ex 15. The letter stated that the Company was withdrawing recognition from the Union. Id. The Union demanded that, in light of the unremedied ULPs, the Company rescind its decision and commence bargaining. The Company refused and no further bargaining was conducted. GC ex. 11.

ANALYSIS

The Company's three-month delay in bargaining was a general refusal to bargain in violation of the Act.

An employer's failure or refusal to meet with the union at reasonable times for the purposes of collective bargaining is a violation of Sections 8(a)(1) and (5) of the Act. McCarthy Constr. Co., 355 NLRB 50, 58 (2010). Evidence of such a violation can be taken from the totality of the company's conduct including cancelling and postponing scheduled bargaining sessions. Id. This is especially true when an employer's assignment of low priority to collective bargaining or taking a lackadaisical attitude towards its obligations results in significant delays in the collective bargaining process. Id. Further, "[I]t is well settled that an employer's chosen negotiator is its agent for the purposes of collective bargaining, and that if the negotiator causes delays in the negotiating process, the employer must bear the consequences." Id., Fern Terrace Lodge, 297 NLRB 8, 17 (1989) ("The busy schedule or unavailability of the bargaining representative or attorney is not a defense for a failure to meet for negotiations").

In the present case, the Union reached out to the Company very shortly after certification. The Company's representatives, Sutton and Teague, scheduled, then cancelled several bargaining sessions resulting in a three-month delay before bargaining could commence. The first cancellation by Sutton was last-minute and attributed to his other obligations. He then attributed his unavailability to selling and packing his very large house. Teague referenced his

schedule, and the schedule of HR, changing when he cancelled sessions. In other words, the Company and its representatives did not see bargaining with the Union as a priority, were in no hurry to get to the table, and acted accordingly.

The Company may argue that, after bargaining commenced, the Union was responsible for some delay during bargaining. At the hearing, the Company accused the Union of not being prepared for the first two bargaining sessions (even though it admitted that it gave the Union no prior notice that it would demand a complete-contract proposal, and that bargaining otherwise took place during these sessions, n. 5 above.), storming out of one bargaining session (even though it admitted that the Union met and conferred with the Company the next day, Tr. 76:9-12 (Sutton)), and the Union ending a bargaining session early one other time (this accusation comes from the Company HR person overhearing people on the Union bargaining team talking about a party, Tr. 82:15-83:17 (Allen)). The Company's allegations are mere attempts to deflect from its own bad behavior and do not relieve it of its refusal to bargain.

The Company's arguments should be rejected for at least three reasons: First, the conduct the Company accuses the Union of cannot be said to have had any bearing on the delay in bargaining because all of this conduct occurred *after* the Company's willful delay strategy. Second, there is no evidence on the record as to how much of a delay the Union's conduct caused beyond, at best, the day and a half that the Union ended sessions early. This is comparatively slight to the three-months delay that the Company imposed on the Union. Third, the Union's conduct is not at issue in this case and there are no pending ULPs filed by the Company against the Union. Tr. 105:17-21 (Torrente). For these reasons, the Company's argument fails. See Fern Terrace Lodge, 297 NLRB at 16-17.

For these reasons, the Company has violated the Act by refusing to bargain for the first three months of certification.

The Company's refusal to provide benefit costing information violated the Act.

"It is well settled that an employer's duty to bargain in good faith with the bargaining representative of its employees encompasses the duty to provide information needed by the bargaining representative to assess proposals and claims made by the employer relevant to contract negotiations." Castle Hill Health Care Ctr. & SEIU 1199 New Jersey Health Care Union., 355 NLRB 1156, 1179 (2010) (Citing NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1967) and NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956)). The Board has repeatedly held that an employer's cost of providing healthcare to its employees is presumptively relevant, particularly during contract negotiations. Prime Healthcare Servs.-Encino, LLC, 364 NLRB No. 128 (Oct. 17, 2016) (citing numerous cases).

In the present case, the employer has admittedly refused to provide the employer's costing information regarding the benefits it provided to its employees. It has provided nothing to rebut the presumption of relevance, and has not forwarded any objections to the information requests. It provided some, but perhaps not all, descriptions of benefits, and some information about the cost to the employees, but was steadfast in its denial to provide employer costs to the Union. The Company even added to its refusal by suggesting that further bargaining over healthcare would be unnecessary: "[T]here seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan."

For these reasons, the Company's refusal to provide the costing information was a violation of the Act.

The Company's withdrawal of recognition and refusal to further bargain with the Union violated the Act.

The certification bar had not expired.

The Board holds that "absent unusual circumstances, an employer will be required to honor a certification for a period of 1 year." Mar-Jac Poultry Co., 136 NLRB 785, 786 (1962) (footnote omitted). During that year, if the employer refuses to bargain with the union, the Board will take measures to assure a period of at least a year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support. Dominguez Valley Hosp., 287 NLRB 149 (1987) (citing Mar-Jac Poultry Co.). The certification year begins on the day that the parties begin good-faith negotiations. Id.

In the present case, unfair labor practices aside, even though the unit was certified on October 3, 2018, good faith negotiations towards a collective bargaining agreement did not begin until – at the very earliest – January 10, 2019. This means that the certification year did not expire until at least January 9, 2020. When the employer withdrew recognition and refused to bargain on November 25, 2019, the did so during the certification year and therefore violated the Act.

The withdrawal was at a time when there were several pending and unremedied unfair labor practices.

A union is presumed to enjoy the support of a majority of the unit employees during the certification year. Lee Lumber & Bldg. Material Corp., 322 NLRB 175, 176 (1996). Thereafter, an employer can rebut the presumption and withdraw recognition if it can show that the union in fact no longer has the support of a majority of the unit employees. Id. at 177. However, such a showing must be made in a context free of unfair labor practices of the sort likely, under all the

circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself. Id.

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support. Id. In cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing loss of support. Id. However, in cases involving an 8(a)(5) refusal to recognize and bargain, the causal relationship between unlawful act and subsequent loss of majority support may be presumed. Id.

In cases where an employer unlawfully fails or refuses to recognize and bargain with the union, any employee disaffection from the union that arises during the course of that failure or refusal results from the earlier unlawful conduct. Id. at 178. This presumption of unlawful taint can be rebutted only by an employer's showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices that would detrimentally affect the bargaining. Id.

In these circumstances, the "reasonable time" for bargaining before the union's majority status can be challenged is between six months and one year. Lee Lumber & Bldg. Material Corp., 334 NLRB 399 (2001) ("Lee Lumber II"). To determine the appropriate length of the reasonable time, the Board conducts a multifactor analysis. Under that analysis, the Board considers "[1] whether the parties are bargaining for an initial agreement, [2] the complexity of the issues being negotiated and the parties' bargaining procedures, [3] the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, [4] the

amount of progress made in negotiations and how near the parties are to agreement, and [5] the presence or absence of a bargaining impasse." Id.

In the present case, even if the certification-year issue does not apply, Lee Lumber and Lee Lumber II do. The initial unfair labor practice in this case was the initial refusal to bargain, which lasted three months. After that, it cannot be said that the Company resumed bargaining for a reasonable time, free of unfair labor practices.

The parties began bargaining on January 10, 2019. The issue of the Union's need for information, and the Company's refusal to furnish it, began immediately (or prior to this date since Virelli's initial pre-bargaining requests also requested benefit costing information). The Company, however, solidified its violation of the Act when the Union requested costing information on April 2, 2019, and the Company's refused via its response on April 10. Only four months had elapsed – which is less than the six required for the minimum amount of reasonable time as stated in Lee Lumber II. This refusal to provide necessary information occurred on April 10, 2019, if not earlier, repeated in July 2019, and was continuous until the Company withdrew recognition on November 25, 2019.

Even if the Company can establish that it resumed bargaining for some period of time, the Lee Lumber II factors support a finding that the "reasonable time" should be closer to one year.

Regarding the first factor, "Parties engaged in initial contract bargaining are likely to need more time to conclude an agreement than parties who are bargaining for a renewal contract. Initial bargaining typically involves special problems." Lee Lumber II, 334 NLRB at 403. In the present case, it is undisputed that the parties were working on an initial contract. This supports the need for a longer "reasonable time" period.

Regarding the second factor, there is nothing in the record suggesting that either party had any specific difficulty with any of the bargaining topics. However, healthcare is undeniably one of the main subjects of bargaining in any negotiation, carrying an inordinate amount of economic importance. Even in relatively simple contracts, the topic has the ability to become complex, especially when one party is not receiving the information necessary to evaluate the other's position. Therefore, this factor weighs in favor of a longer "reasonable time" period.

Regarding the third factor, the parties bargained from January 10, 2019 until November 25, 2019. The record shows that, at least for some of these eleven months, the parties were bargaining two days per month, eight hours per day, and that the Union is allegedly responsible for the parties not bargaining for up to 1.5 days. There is certainly nothing in the record to suggest that the parties bargained for long hours, extended periods, or that the parties were exhausted from bargaining. Therefore, since "[n]egotiations generally require time and meetings to bear fruit," this factor weighs in favor of a longer "reasonable time" period.

Regarding the fourth factor, "[W]hen the parties have almost reached agreement and there is a strong probability that they will do so in the near future, we will view progress as evidence that a reasonable time for bargaining has *not* elapsed." Id. at 404 (emphasis in original). As Torrente testified, the parties had agreed to much of the contract and the only issues left were a few big-ticket economic issues. Virelli testified that she was optimistic that the contract would be completed in the two days of bargaining in November, had the employer not refused to bargain. Therefore, this factor weighs in favor of the parties having more time to bargain, that is a longer "reasonable time" period.

Regarding the fifth factor, "[T]he existence of impasse is a factor weighing in favor of a finding that a reasonable time for bargaining has passed, and the absence of impasse weighs

against such a finding." Id. In this case, neither party has alleged that the parties were at an impasse, and as mentioned in the paragraph above. In fact, Virelli testified to the opposite. Therefore, this factor weighs in favor of a longer reasonable time period.

For these reasons, the Company cannot establish that it bargained in good faith for any six-month period, but even if it can, it cannot show that such a period was "reasonable" under Lee Lumber II. Therefore, the Company violated the Act by withdrawing recognition.

CONCLUSION

For the above-mentioned reasons, the Union requests that the relief requested in the complaint be granted.

Respectfully Submitted,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL UNION 228

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Dated: September 8, 2020

CERTIFICATE OF SERVICE

I, Stuart Shoup, hereby certify that I caused a true and correct copy of the foregoing Post-Hearing Brief of the Charging Party to be e-filed with the NLRB Division of Judges, and served via email on the following parties on the date below:

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Dated this 8th day of September, 2020

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